Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
Sandwich Isles Communications, Inc.	)	
	)	
Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary and Sections 36.611 and 69.2(hh) of the Commission's Rules	)	CC Docket No. 96-45
	)	

WAIMANA ENTERPRISES INC.'S
PETITION FOR RECONSIDERATION

Pursuant to Section 1.106 of the Commission Rules, Waimana Enterprises Inc. ("WEI") seeks reconsideration of the Commission Memorandum Opinion and Order (MO&O) FCC 17-85, issued July 3, 2017. In that Order, which is one of a series of unfounded and ill-advised determinations affecting communications service to the Hawaiian Homelands and the native Hawaiians who reside there.

The Hawaii Supreme Court unequivocally stated that the Department of Hawaiian Home Lands, headed by the Hawaiian Homes Commission, received **exclusive** control of Hawaiian home lands by section 204 of the Hawaiian Homes Commission Act. Ahuna v. Dept. of Hawaiian Home Lands, 640 P.2d 1161, 1168 (1982). The Hawaii Attorney General has likewise confirmed that the United States Congress passed the Hawaiian Homes Commission Act in order to "create a class of lands **separate** and **distinct** from other public lands, to be utilized for the rehabilitation of the Hawaiians and to vest control over the use of such lands in the [Commission] **and not in any other governmental agency**. " Op. Atty Gen. 72- 21 (1972). The legislative history (Congressional Record, 66th Gong., 2d Sess. 7495) confirms that the Hawaiian Home Lands were **"withdrawn"** from the jurisdiction of the Hawaii authorities and placed in the exclusive control of the Commission. Yet, with the stroke of a pen, the FCC purports to void all of

the existing legal precedents and instead make the HHL subject to DHHL's paternalistic judgment of "what's best" for native peoples.

The FCC's ruling to preempt the "exclusive" license voluntarily agreed upon by the Hawaii Department of Hawaiian Homelands ("DHHL") to WEI, after the Commission has known about, acquiesced in, and enjoyed the benefits of it for 20 years is astounding. The Hawaiian Homes Commission received tremendous benefits from the license, including many millions of dollars of infrastructure investment which was made possible only because of the exclusivity promised in the license. The FCC's ruling (and DHHL's violation of its own agreement by requesting the ruling) amounts to an unconstitutional taking of many tens of millions of dollars of infrastructure investment made in the homelands specifically in reliance on that exclusive license. FCC and DHHL have both illegally exposed themselves to liability for millions of dollars in compensation for their unconstitutional taking.

The order needs to be reconsidered because the Commission has either misread or implicitly amended its own rule to effectively deny the residents of the Hawaiian Homelands the benefits to which they are entitled under the federally mandated High–Cost Universal Service program. Moreover, the Order goes well beyond the scope of the DHHL Request and rests largely upon the Commission's prejudgment of matters which are related to the DHHL issue only in that they involve WEI, its principals and Sandwich Isles Communications, Inc. ("SIC"), the service provider. In support, the following is stated:

A. <u>THE STATUS OF THE HOMELANDS UNDER FCC RULES</u>

Having erroneously concluded that State title to the Homelands is dispositive of the applicability of Section 253 of the Act, the Order proceeds to compound the error by further misreading (or at best amending) section 54.5 of the Commission's Rules. The Rule, by its own terms, specifically includes the Hawaiian Homelands, defined as "areas held in trust for Native Hawaiians." 47 CFR 54.5. The

Commission concludes that this definition does not prevent it from treating the Homelands as just another municipality on two grounds. First, the Order states that the Hawaiian Homelands are not "analogous" to other tribal lands because there is no direct tribal–federal "relationship" as there is with treaty based relationships on the mainland. FCC 17-85 at para. 12. Second, the Order states that, in any event, it has held that it is free to preempt regulations governing Tribal Lands. The first of these propositions is ***contradicted by the language and the purpose of the Rule itself***. The second is entirely irrelevant.

The simple and unassailable fact is that the definition of Tribal Lands expressly includes Hawaiian Home Lands and is not based on the existence or non-existence of a direct federal relationship between the Federal Government and the entity holding title or governing the area defined in the Rule. The Rule by its terms includes "former" reservations such as Oklahoma. The Commission surely does not mean to contend that land which once may have been, but is no longer, subject to the putative direct relationship is within the scope of the definition but that lands held in trust for the use and benefit of Native Hawaiians is not. Such an analysis would offend not only the Administrative Procedure Act but, indeed, the Fourteenth Amendment to the U.S. Constitution.

Moreover, the Commission has made its scope and purpose of the Tribal Lands definition abundantly clear. In the Mobility Fund NPRM which preceded it, Universal Service Reform – Mobility Fund, Notice of Proposed Rulemaking, 25 FCC Rcd 14,716 (2010), and in the Report and Order adopting the rules which include this definition, the Commission unanimously set forth its reasons for including within the definition the Hawaiian Homelands. It stated that the definition was needed to recognize that there has been a "relatively low level of telecommunications deployment" in these areas and that there are "distinct challenges in bringing connectivity to these areas." In the Matter of Connect America Fund, Report and Order, FCC 11–161 at para. 479 (Nov. 18, 2011) ("2011 Report and Order"). The

Commission said that, as a result, "greater financial support may be needed in order to ensure" service to Tribal Lands as defined and that a "more tailored approach" regarding support may be beneficial.

There can be no question that these considerations are directly applicable to the Hawaiian Homelands. As the Commission is perfectly well aware, but for the service now provided by SIC, many parts of the Homelands would still have no service and in some areas SIC is the only public safety service available. *See* In the Matter of Sandwich Isles Communications, Inc., Docket No. 09-133, Comments of Sandwich Isles Communications, Inc. (April 29, 2016).

B. PREEMPTION DOES NOT SERVE ANY LEGITIMATE PUBLIC INTEREST PURPOSE

In sum, the definition of "Tribal Lands" is not based on formal legal status; it is not based on the locus of "title" to the area. It is rather based on the relative need for Universal Service Support in the geographic area comprising the Tribal Land. By attempting to tie its definition of Tribal Lands solely to the formalities of legal status the Commission has done violence to the language and the purpose of its own Rule and in so doing it disparages the need for USF Service in the Hawaiian Homelands.

In these circumstances, there is no need address the question of whether the Commission does indeed have the power to apply Section 253 and 254 to Tribal Lands as it claims in the Order. That assertion is based on a single Memorandum and Opinion which has nothing to do with the issue presented here. *See* AB Fillins, Memorandum Opinion and Order, 12 FCC Rcd 11755 (1997); *see also* AB Fillins, Order on Reconsideration, FCC 00-84, (March 14, 2000). Because of the mechanical approach to its own rules and to the Hawaii Constitution, the Commission has simply failed to follow the "tailored approach" to USF decisions that it outlined in its 2011 Report and Order. Despite the Commission's claim to the contrary, there is nothing in the language of Section 253 which makes the application of that statute to Tribal Lands mandatory, and in the 2011 Report and Order, the Commission expressly found that there are circumstances in which the proper and efficient implementation of the USF

program required the selection of a single USF service provider. 2011 Report and Order at para. 316. Since the Commission's Order in the current case does not appear to overrule that determination, SIC remains the only eligible USF service provider in the Hawaiian Homelands. In those circumstances, the only thing ritualistic invocation of Section 253 accomplishes is to allow competitors to cherry pick the business areas of the Homelands thereby further burdening the cost of providing service to the beneficiaries of the Trust.

The sudden invocation of Section 253 to preempt enforcement of the DHHL license is unjustified and particularly arbitrary in light of the long history of the efforts to secure communications services to the Homelands. As WEI spelled out in its Reply, the FCC "has known and understood from the outset" that the License negotiated between DHHL and WEI is "exclusive" and was structured as it was to enable DHHL to obtain service for all of the homesteaders in SIC's study area no matter how remote they may have been. Reply of Waimana Enterprises Inc. at 6. The details of the arrangement and its disclosure to the FCC, including the support advanced by DHHL, are spelled out in the attachments to WEI's Reply. *See* Appendix A, B, and C. The history is simply ignored in the Order. Equally, the Commission ignores the fact that the arrangement entered into by DHHL and implicitly accepted by the FCC 20 years ago has accomplished its objectives. There is not one word in the DHHL "request" or the Commission Order suggesting that WEI or SIC failed to deliver communications services or that the service provided has been inadequate. Such a finding might justify a change in the Commission's view of the proper approach to the application of Section 253. But no such finding has been made because there is utterly no basis for faulting the service that WEI and SIC have provided.

Instead, the Order starts from – and WEI submits ultimately rests on – a purported finding of "facts" which are not facts are at all and which are, in fact, contested in pleadings which the Commission persists in ignoring. At paragraph 3 of the Order the Commission invokes the USAC Report which asserts that SIC has "improperly received" $27 Million in USF funds and that the Bureau has been instructed to

determine whether SIC should be denied eligibility to receive USF funds. But, USAC's so called "finding" is far from final or definitive for the reasons SIC has spelled out in its Petition for Reconsideration and related pleadings. In the circumstances, the only connection between the USAC Report and the issue presented under Section 253 is that both the USAC Report and this Order involve the same parties. But surely the Commission does not mean to conclude that WEI and SIC are collaterally estopped from arguing that the 20 year old exclusivity license which has served the purpose for which it was created on the basis of a decidedly non-final Order that is based on a USAC Report which it riddled with error. At the very least, the Commission should refrain from reaching conclusions concerning the application of section 253 to the Hawaiian Homelands until such time as there is a definitive resolution of the unrelated issue which underlies the Order.

DATED: Honolulu, Hawaii, August 3, 2017.

/s/ Lex R. Smith
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